87-1569

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1987

JOHN PIMENTEL and
DUROYD MANUFACTURING CO., INC.,
Petitioners,

-against-

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Question Presented

Whether the "inevitable discovery" doctrine set forth in *Nix v. Williams*, 467 U.S. 431 (1984), should be extended to preclude suppression of physical evidence that is observed and taken by the authorities during an illegal search and seizure?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners John Pimentel and Duroyd Manufacturing Co., Inc. respectfully pray that a writ of certiorari issue to review the judgments of conviction and opinions of the United States Court of Appeals for the Second Circuit entered on January 22, 1988 and February 3, 1987.

Opinions Below

The unpublished opinion of the Court of Appeals affirming the conviction of the petitioners appears in the Appendix beginning at page 1a. The opinion of the Court of Appeals on the government's interlocutory appeal

reversing the district court's order suppressing certain evidence is published at 810 F.2d 366 (2d Cir. 1987), and appears in the Appendix beginning at page 1a. The opinion of the district court denying modification of its order suppressing certain evidence is published at 626 F. Supp. 1372 (S.D.N.Y. 1986), and appears in the Appendix beginning at page 12a. The unpublished opinion of the district court with respect to the defendants' motion for reconsideration of certain factual findings appears in the Appendix beginning at page 21a.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on January 22, 1988, and this petition for a writ of certiorari was filed within sixty days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

As appears from the following discussion, the issue we raise in this petition does not relate to matters that were litigated in the Second Circuit on the recent appeal from the judgments of conviction. Rather, the issue we raise was litigated on a previous interlocutory appeal brought by the government, in which the Second Circuit reversed a suppression order that had been entered by the district court. After the Second Circuit reversed, the petitioners were tried and convicted, and their convictions were affirmed. At this point, the petitioners plainly are entitled to bring to this Court for review the Second Circuit's interlocutory order reversing suppression and permitting the introduction of unlawfully seized evidence at the trial. See, *e.g.*, 12 J. Moore, H. Bendix & B. Ringle, *Moore's Federal Practice*, Para. 110.01, at 6-18 (2d ed. 1982) ("Upon reviewing a judgment of the court of appeals, the Supreme Court may reach back into the proceeding in the lower court to correct interlocutory orders or errors that occurred prior to the court of appeals' entry of judgment and materially affected the subsequent proceeding" (footnote omitted)).

Statement of the Case

Petitioners John Pimentel and Duroyd Manufacturing Co., Inc. ("Duroyd") were convicted after a jury trial in the Southern District of New York for conspiring to defraud the United States, making false statements to the United States, and making false claims on the United States. 18 U.S.C. §§ 2, 287, 371 and 1001. The facts underlying the convictions are set forth in some detail in the opinions of the court of appeals and district court. Briefly, however, the trial evidence (viewed in the light most favorable to the prosecution) establishedthat, in the Spring of 1982, Duroyd, a company wholly owned by John Pimentel, bid successfully for a contract from the Department of Defense for the production of portions of artillery shells. Duroyd agreed to provide a number of components, including metal casing that had to be manufactured to a specified level of hardness. When Duroyd submitted its original pricing information, it stated that its cost would include a special heat-treating process to be performed by a sub-contractor. According to the government's proof, however, Duroyd had received a letter from the sub-contractor dated March 2, 1982, indicating that the steel to be used for the casing already satisfied Department of Defense specifications, and that no additional heat treatment would be necessary. At Duroyd's request, the sub-contractor sent Duroyd a revised version of the March 2 letter that omitted any reference to the sub-contractor's ability to provide the specified steel without additional heat treatment. It was this revised version of the March 2 letter that Duroyd submitted to the Department of Defense.

These two letters -- the original letter of March 2, 1982 and the revised letter of March 19, 1982 -- ultimately became the focal point of the prosecution in this case. In November, 1983, the Defense Contract Audit Agency commenced an audit of Duroyd. During this audit, the auditor obtained the two letters while covertly searching through company files contained in a filing cabinet.

Further investigation, culminating in the indictment of Pimentel and Duroyd, followed the illegal seizure of the letters.

The petitioners moved pre-trial to suppress the two letters and their fruits on the ground that they were the product of an illegal search and seizure. After a hearing on December 18, 1985, the district court held that the covert search of the filing cabinet violated the defendants' legitimate expectations of privacy, and it ordered suppression of the two letters. However, the district court initially refused to suppress the indirect fruits of the illegal search, including copies of the letters obtained from the sub-contractor, relying on the "inevitable discovery" doctrine and finding that the government auditor would inevitably have discovered the other evidence.

The government then moved for reconsideration of the suppression order, contending that the two letters originally seized from the file cabinet, even though the direct products of an illegal search, were admissible under the "inevitable discovery" doctrine as set forth in this Court's decision in *Nix v. Williams*, 467 U.S. 431 (1984). In an opinion published at 626 F. Supp. 1372 (S.D.N.Y. 1986), the district court adhered to its ruling suppressing the two letters. The court explicitly held that the letters, which were the direct product of an illegal search, were not subject to the "inevitable discovery" exception to the exclusionary rule. (23a-24a)

This did not conclude the pre-trial litigation over the letters. The defendants then moved for reconsideration of the district court's factual finding that the government would have inevitably discovered copies of the two letters and other evidence. Specifically, defense counsel argued that, but for the illegal search, the letters would not have been discovered and the criminal investigation of Duroyd never would have taken place. On reconsideration the

The district court's initial ruling, as summarized in the text, was not contained in a written opinion.

district court agreed that the government had failed to prove by a preponderance of the credible evidence that it would have discovered the letters absent the illegal search and seizure. Accordingly, the court held that the letters as well as any resulting fruits of the search, including "the entire criminal investigation and prosecution," had to be suppressed. (19a)

The government then took an interlocutory appeal from the February 6, 1986 order suppressing the direct fruits of the illegal search as well as the May 13, 1986 order reconsidering the factual finding that the letters would have been inevitably discovered.

On February 3, 1987, the court of appeals reversed the district court. Specifically, the Second Circuit first reinstated the district court's original factual finding that discovery of the letters was inevitable. It then held that the inevitable discovery doctrine applied both to the direct and indirect products of an illegal search. Accordingly, the court of appeals ruled that even the original letters taken illegally from Duroyd's file cabinet would not be suppressed. Finding that those letters would have been discovered during the defense department audit, the court held that the receipt of the letters "would not encourage Fourth Amendment abuse." (10a) The court of appeals did not make a specific finding that the audit would have been pursued even had the letters not been unlawfully observed and taken.

At the ensuing trial, the two letters formed the linchpin of the government's case. Indeed, the trial judge remarked at the sentencing that the guilty verdict followed directly from the introduction of the letters. Following the verdict, Pimentel was sentenced to a three-year term of imprisonment, a fine, and restitution. Duroyd was also fined. The court of appeals affirmed the convictions in an unpublished opinion entered on January 22, 1988. This petition followed.

Reasons for Granting the Writ

The issue we raise in this petition is whether the "inevitable discovery" doctrine, an exception to the exclusionary rule, should extend not only to the "fruits" of an illegal search or seizure, but also to the very evidence that is obtained by the government as a direct result of an unconstitutional seizure. This issue has not been resolved in this Court's recent decisions regarding the "inevitable discovery" doctrine. *See Nix v. Williams*, 467 U.S. 431 (1984); *Segura v. United States*, 468 U.S. 796 (1984). We are aware, however, that this Court now has pending *sub judice* a case raising closely related issues about the proper scope of the "inevitable discovery" doctrine. *United States v. Moscatiello*, 771 F.2d 589 (1st Cir. 1985), *cert. granted sub nom. Murray v. United States* and *Carter v. United States*, Dkt Nos. 86-995, 86-1016 (argued December 9, 1987). We understand that one of the issues in *Murray* and *Carter* is whether the "inevitable discovery" doctrine permits the introduction of evidence that is itself first observed by the authorities during the course of an illegal search.

Inasmuch as this issue has been fully briefed and argued before this Court, we will not lengthen this petition with a detailed statement of the reasons why we believe that the Second Circuit's analysis of the "inevitable discovery" doctrine is mistaken. As the petitioners in *Murray* and *Carter* have argued, the extension of that doctrine to sanction the admission into evidence of the direct product of an illegal search would substantially eviscerate the exclusionary rule. Most importantly, it would provide the authorities with a strong incentive to commit warrantless and illegal searches, and to apply for a warrant (or, in this case, to continue with their audit) only if they discovered incriminating evidence and therefore knew that they had to validate their illegal actions after the fact.

Likewise, we adopt the argument of the petitioners in *Murray* and *Carter* that the failure to suppress the direct products of illegal police activity (such as the

letters in this case) would contradict this Court's prior holdings. Thus, as the district judge in this case noted, in *Nix v. Williams*, *supra*, the "inevitable discovery" doctrine did not permit the state to offer into evidence the direct fruits of its illegal conduct, which were the statements that the defendant made about the location of the murder victim's corpse. Rather, the doctrine authorized only the receipt of the evidence relating to the discovery and condition of the body, on the basis that that evidence would have been discovered even if the defendant's incriminating statements had not been improperly obtained. Similarly, in *Segura v. United States*, *supra*, the Court strongly intimated that the "inevitable discovery" doctrine set forth in *Nix* only provided an exception to the exclusionary rule for evidence that constitutes the indirect fruits of an illegal search or seizure. Specifically, the Court stated:

> Evidence obtained as a direct result of an unconstitutional search or seizure is plainly subject to exclusion.

468 U.S. at 804.

Presumably, this Court granted review in *Murray* and *Carter* to resolve these issues, and to resolve also a split among the circuit courts of appeal over the proper scope of the "inevitable discovery" doctrine. Thus, in *Murray*, the First Circuit affirmed a lower court order refusing to suppress the seizure of bales of marijuana that were first observed by agents when they illegally entered a warehouse. The First Circuit, like the Second Circuit in this case, extended the "inevitable discovery" doctrine even to preclude suppression of the very evidence first discovered illegally. The First Circuit explicitly acknowledged that its holding conflicted with that of the Sixth Circuit in *United States v. Griffin*, 502 F.2d 959 (6th Cir.), *cert. denied*, 419 U.S. 1050 (1974).

If anything, the factual circumstances underlying this case present an even more compelling argument for limiting the scope of the "inevitable discovery" doctrine

than the facts in *Murray*. In *Murray*, the police merely *saw* the evidence during the illegal search. Seizure did not occur until the agents returned with a warrant. In contrast, in this case not only did the government illegally search Duroyd's file cabinet, but it also *seized* the two letters at issue during the warrantless search.

We respectfully submit that this Court should make explicit what is already implicit in *Nix* and *Segura* and limit the "inevitable discovery" doctrine to evidence that is the indirect fruit of a constitutional violation. The doctrine should not be applied, as it was in this case, to permit the government illegally to seize documents and then to offer those same documents in evidence against the accused.

While this case presents an appropriate vehicle for the resolution of these issues, we recognize that the Court will consider closely related issues when it announces its decision in the *Murray* case. Accordingly, we respectfully request that the Court follow its usual procedure with respect to petitions that raise issues that may be *sub judice*, and hold this petition until such time as *Murray* is decided. If the judgment in that case is reversed, as we believe is appropriate, then we ask the Court to grant this petition, summarily vacate the judgment below, and remand the case to the Second Circuit for further consideration in light of this Court's opinion. Alternatively, if this Court's decision in *Murray* does not control this case, then we urge the Court to grant the writ and set this case down for briefing and argument to resolve whatever issues remain open in light of *Murray*.

Conclusion

The petition for a writ of certiorari should be granted.

Dated: New York, New York
March 16, 1988

Respectfully submitted,

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APPENDICES

Appendix A
Opinion of United States Court of Appeals
January 22, 1988

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-second day of January, one thousand nine hundred and eighty-eight.

Present: HONORABLE THOMAS J. MESKILL,
HONORABLE RALPH K. WINTER,
HONORABLE FRANK X. ALTIMARI,
Circuit Judges.

FILED January 22, 1988

Docket No. 87-1354

UNITED STATES OF AMERICA,
Appellee,

v.

JOHN PIMENTEL and DUROYD MANUFACTURING CO., INC.,
Defendants-Appellants.

This is an appeal from a judgment of conviction entered by the United States District Court for the Southern District of New York, Brieant, *C.J.*, following a jury trial for conspiring to defraud the United States, making false statements to the United States, and making claims on the United States. 18 U.S.C. §§ 2, 287, 371 and 1001.

Appendix A
Opinion of United States Court of Appeals
January 22, 1988

This cause came on to be heard on the transcript of record from said district court and was argued by counsel.

The judgment of conviction is AFFIRMED.

Appellants complain that their cross-examination was unduly restricted when he tried to delve into 1979 dealings between Duroyd and Mundex. On this record we cannot say that the district judge abused his broad discretion in blocking this line of inquiry on relevancy grounds under Fed. R. Evid. 403. Moreover, the evidence of guilt was overwhelming.

The grant of acquittal on count 1(a) did not, as appellants contend, constitute a prejudicial amendment that voided the indictment. On the contrary, it permissibly narrowed the indictment leaving a charge that had been clearly set out. *See United States v. Miller*, 471 U.S. 130, 140-44 (1985).

Appellants contend that count 3 actually charged three separate offenses and was therefore duplicitous. While the government could have charged each document as a separate offense, it was under no duty to do so unless including all within a single count would result in unfairness to the defendant, certainly not the case here. *See United States v. Margiotta*, 646 F.2d 729, 733 (2d Cir. 1981), *cert. denied*, 461 U.S. 913 (1983). Here, the falsity of the submission as a whole was charged. Also, it was appropriate to group the submissions because appellants themselves had sent them to the United States in that form.

Appellants argue that they should not have been convicted on counts 4-7 because no causal connection was made between their cost concealment and the awarding of the contract. Chief Judge Bricant charged the jury that, to convict on these counts, it must find that

the contract was procured by fraud. There was sufficient evidence from which the jury could have inferred that the contract would not have been awarded had the government known of the fraud.

If a contract is procured by fraud, and requests for payment under it are inflated as a consequence of the fraud, those requests constitute false claims. *See United States ex rel. Marcus v. Hess*, 317 U.S. 537, 543-44 (1943); *United States v. Winchester*, 407 F.Supp. 261, 272-73 (D. Del. 1975). In *United States v. Huber*, 603 F.2d 387 (2d Cir. 1979), *cert. denied*, 445 U.S. 927 (1980), we held that fraud tainted bills submitted for reimbursement constituted "false statements." *Id.* at 398-99. The jury properly could infer that the contract in this case was procured by fraud and that the progress payments were inflated by the fraud. Therefore, we see no reason to disturb the verdict on the four progress payment counts.

We have considered appellants' other claims and find them to be without merit.

/s/ _____
Thomas J. Meskill, U.S.C.J.

/s/ _____
Ralph K. Winter, U.S.C.J.

/s/ _____
Frank X. Altimari, U.S.C.J.

Appendix B
Opinion of United States Court of Appeals
February 3, 1987

UNITED STATES OF AMERICA,
Appellant,

v.

JOHN PIMENTEL and DUROYD MANUFACTURING CO., INC.,
Defendants-Appellees.

No. 130, Docket 86-1271

United States Court of Appeals,
Second Circuit.

Argued Sept. 24, 1986 Decided Feb. 3, 1987.

Government appealed from order of the United States District Court for the Southern District of New York, Charles L. Brieant, Chief Judge, 626 F.Supp. 1372, which suppressed evidence. The Court of Appeals, Van Graafeiland, Circuit Judge, held that: (1) Defense Department auditor had right to see letters written by subcontractor to Government contractor charged with falsifying and concealing material facts from Government; (2) letters seized by auditor would have inevitably been discovered as part of ongoing audit; and (3) inevitable discovery rule applies to direct as well as indirect fruits of illegal seizure.

Reversed.

Henry Pitman, Asst. U.S. Atty., New York City (Rudolph W. Giuliani, U.S. Atty. S.D.N.Y., and Kenneth Roth, Asst. U.S. Atty., New York City, of counsel), for appellant.

Appendix B
Opinion of United States Court of Appeals
February 3, 1987

Richard A. Sauber, Washington, D.C. (Fried, Frank, Harris, Shriver, & Jacobson and Stephen A. Mansfield, Washington, D.C., of counsel), for defendants-appellees.

Before VAN GRAAFEILAND, MESKILL and NEWMAN, Circuit Judges.

VAN GRAAFEILAND, Circuit Judge:

The United States appeals from a February 6, 1986 Memorandum and Order of the United States District Court for the Southern District of New York, reported at 626 F.Supp. 1372, as modified by an unreported Memorandum and Order dated May 13, 1986. The orders suppressed two incriminating letters uncovered during a post-contract audit of appellee corporation by a representative of the Department of Defense. For the reasons hereafter assigned, we reverse.

In the Spring of 1982, Duroyd Manufacturing Co., a corporation wholly owned by appellee John Pimentel, submitted a bid proposal to the Department of Defense for the manufacture of portions of artillery shells, and was awarded a contract which fixed the price on a cost-plus percentage basis. Included in the parts to be manufactured was a steel "column segment," which was required to be heat treated until it reached a specific degree of hardness. The proposal submitted by Duroyd included an item representing the purported cost of having the heat treatment performed by a subcontractor. As a matter of fact, Mundex Metal Corp., the vendor which furnished the steel for the column segment, treated and hardened the steel at no additional cost to Duroyd, and this information was deliberately withheld from the Defense Department. In a letter to Duroyd dated March 2, 1982, Mundex informed Duroyd of its ability to guarantee the specified hardness. On March 19, Mundex wrote Duroyd again at its request, enclosing a "new" March 2 letter which did not contain the information

concerning the ability of Mundex to furnish pre-hardened steel. It was the "new" March 2 letter that Duroyd submitted to the Department of Defense. It is the original March 2 letter and the covering letter of March 19 whose suppression has given rise to this appeal. Because appellees have been indicted for falsifying and concealing material facts from, and making false and fraudulent statements to, the Defense Department, 18 U.S.C. §§ 1001 and 1002, the foregoing letters are an important part of the Government's case.

[1] There can be no question concerning the Defense Department auditor's right to examine these letters in the course of his audit. *See Bowsher v. Merck & Co.*, 460 U.S. 824, 831-34, 103 S.Ct. 1587, 1592-94, 75 L.Ed.2d 580 (1983). The statutes so provide, and so does the specific language of the contract. *See Bristol Laboratories Division of Bristol-Myers Co. v. Staats*, 428 F.Supp. 1388, 1391 (S.D.N.Y. 1977), *aff'd on opinion below*, 620 F.2d 17 (2d Cir. 1980), *aff'd by equally divided court*, 451 U.S. 400, 101 S.Ct. 2037, 68 L.Ed.2d 184 (1981); 10 U.S.C. §§ 2306(f)(1), (3) and 2313(a)(1), (b). The contract provision, which substantially tracks the statutory language, provides that "[the auditor] shall have the right to examine books, records, documents, and other evidence and accounting procedures and practices, sufficient to reflect properly (1) all direct and indirect costs of whatever nature claimed to have been incurred and anticipated to be incurred for the performance of this contract . . . ." However, the district court, after resolving disputed issues of fact at a suppression hearing in favor of appellees, held that the auditor had violated appellees' constitutional rights by removing the letters from a file without appellees' consent. The district court then went on to conclude "that these documents would have been found in any event as a result of the audit, that the audit was started, of course, before these documents were

found or known to the government, and therefore the prosecution here is not the fruit of the poison [sic] tree."

[2] Despite its finding of inevitable discovery, the district court held that the Government could not introduce the letters as evidence on the trial. The Government then asked the court to reconsider its holding in the light of *Nix v. Williams*, 467 U.S. 431, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984), and this led to the decision reported in 626 F.Supp. at 1372. In that decision, the district court held that the inevitable discovery rule adopted in *Nix* applied only to the "fruit of the poisonous tree" and not to the "poisonous tree" itself, which is how the court described the seized letters. *Id.* at 1374. The district court continued to hold that the Government might introduce other evidence that would elicit the same information contained in the letters. *Id.*[1]

Appellees then asked the district court to reconsider its finding of inevitable discovery, and the court, through a *sua sponte* misinterpretation of 10 U.S.C. § 2306(f)(1), held that the incriminating letters would not inevitably have been discovered. Section 2306(f)(1)(A) requires a prime contractor or any subcontractor to furnish cost or pricing data and to certify to its accuracy "prior to the award of any negotiated prime contract under this title where [as in Duroyd's case] the price is expected to exceed $500,000." Section 2306(f)(1)(C) imposes the same requirements "prior to the award of a subcontract at any

[1] We are uncomfortable with the district court's description of the Mundex letters as the "poisonous tree." The unlawful seizure is the poisonous tree; the letters are the "fruits" of the seizure. *See United States v. Leon*, 468 U.S. 897, 903 n. 1, 905, 924, 104 S.Ct. 3405, 3410 n. 1, 3412, 3422, 82 L.Ed.2d 677 (1984); *Wong Sun v. United States*, 371 U.S. 471, 487-88, 83 S.Ct. 407, 417-18, 9 L.Ed.2d 441 (1963); *Nardone v. United States*, 308 U.S. 338, 341, 60 S.Ct. 266, 267-68, 84 L.Ed. 307 (1939). The distinction which the district court attempted to make was between the direct and the indirect product of the unlawful search, or "poisonous tree."

tier, where the prime contractor and each higher tier subcontractor have been required to furnish such a certificate, if the price of such subcontract is expected to exceed $500,000." Apparently overlooking the provisions of subdivision (A) and its application to the instant case, the district court held:

> Under the law, Duroyd was required to submit to the DoD or to keep in its files any information relating to subcontract purchases that totalled $500,000 or more. Duroyd purchased the metal from Mundex Metals for less than that amount. Thus, the auditor did not have the right to demand copies of these vendor quotes, and Duroyd did not have the obligation under the contract to provide them to him.

The district court then concluded, "Thus, the entire criminal investigation and prosecution are among the fruits of the illegal search."

[3-5] We hold, as we are permitted to do, *see Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844, 855 n. 15, 102 S.Ct. 2182, 2189 n. 15, 72 L.Ed.2d 606 (1982), that the district court's original finding of inevitable discovery was clearly correct and that its later finding to the contrary, based on a misreading of the pertinent statutes, was clearly wrong. Our ultimate decision, then, turns on the question whether, under the facts of this case, the inevitable discovery exception to the exclusionary rule applies to the direct as well as the indirect products of the government's unlawful search. We hold that it does.

When the Supreme Court, in *Nix v. Williams, supra*, 467 U.S. 431, 104 S.Ct. 2501, approved an inevitable discovery exception to the exclusionary rule, it was not promulgating a revolutionary doctrine. Indeed, in the earlier case of *United States v. Crews*, 445 U.S. 463, 100

S.Ct. 1244, 63 L.Ed.2d 537 (1980), the Court recognized inevitable discovery as one of the "commonly advanced exceptions to the exclusionary rule." *Id.* at 470, 100 S.Ct. at 1249. More importantly, there is nothing in the *Nix* opinion which supports the district court's statement in the instant case that the *Nix* Court intended its holding to apply only to the "fruit of the poisonous tree" as the district court defined that phrase. 626 F.Supp. at 1374.

Chief Justice Burger, writing for the Court majority in *Nix*, pointed out that every Federal Court of Appeals had already endorsed the inevitable discovery doctrine. 467 U.S. at 440 n. 2, 104 S.Ct. at 3411 n. 2. Among the cases which Chief Justice Burger cited with apparent approval were *United States v. Romero*, 692 F.2d 699 (10th Cir. 1982), *United States v. Apker*, 705 F.2d 293 (8th Cir. 1983), and *United States v. Roper*, 681 F.2d 1354 (11th Cir. 1982). A review of these cases is illuminating.

In *Romero*, after DEA officers stopped a van which they suspected contained marijuana, one of the officers searched a defendant and removed a bag of marijuana from his pocket. This, the court held, "transgressed the permissible limits of a *Terry* pat-down search for weapons." 692 F.2d at 703. The court nonetheless held evidence of the marijuana admissible under the inevitable discovery doctrine. *Id.* at 704. In *Apker*, defendants, who were convicted of being felons in possession of firearms, sought to suppress evidence of the firearms because they were discovered while a search was being made under a defective warrant. Referring to the more common situation where the element that made the seizure illegal was a prior illegality and the seizure was the "fruit of the poisonous tree," the court said that it did "not see a basis for distinguishing between the causes of the illegality" and that "the policy behind the exclusionary rule supports application of the 'inevitable discovery' exception to this case more than it supports another exception to

the exclusionary rule." 705 F.2d at 307. In *Roper*, airline tickets and a pistol, found by DEA agents who had unlawfully entered defendant's motel room, were held properly admitted, because they would undoubtedly have been discovered following the defendant's arrest. 681 F.2d at 1357-59. A fair reading of *Nix* shows that the Court intended its decision to conform to the above holdings. *See* 467 U.S. at 447, 450, 104 S.Ct. at 2511, 2512-13; *id.* at 459, 104 S.Ct. at 2517 (Brennan, J., dissenting).

Other courts have expressed or implicitly interpreted *Nix* in the same manner. *See, e.g., United States v. Silvestri*, 787 F.2d 736 (1st Cir. 1986); *United States v. Andrade*, 784 F.2d 1431 (9th Cir. 1986); *United States v. Merriweather*, 777 F.2d 503, 506 (9th Cir. 1985), *cert. denied*, ____ U.S. ____, 106 S.Ct. 1497, 89 L.Ed.2d 898 (1986); *United States v. Martinez*, 625 F.Supp. 384, 392-93 (D. Del. 1985); *United States v. Levasseur*, 620 F.Supp. 624, 631-32 (E.D.N.Y. 1985).

There is a difference among the Circuits, however, concerning whether application of the inevitable discovery exception hinges on the existence of an alternate line of investigation that is being actively sought or pursued at the time of the government misconduct. Judge Bownes, who wrote the opinion in *Silvestri, supra*, held that, rather than setting up an "inflexible 'ongoing' test," the "analysis [should] focus on the questions of independence and inevitability and remain flexible enough to handle the many different fact patterns which will be presented." 787 F.2d at 746. Since there is no need to apply Judge Bownes' flexible test to the facts of the instant case, we see no need to reach out and adopt it. Here, there was an ongoing audit which surely would have uncovered the letters at issue. Admitting them in evidence would not encourage Fourth Amendment abuse. Like the court in *McGarry v. United States*, 388 F.2d 862 (1st Cir. 1967), *cert. denied*, 394 U.S. 921, 89 S.Ct. 1178, 22

Appendix B
Opinion of United States Court of Appeals
February 3, 1987

L.Ed.2d 453 (1969), "[w]e suspect that the government would ordinarily seek to avoid both the inconvenience of delay when records are required to be returned and the risk of a judicial finding that valuable leads were obtained while records were in wrongful custody." *Id.* at 871. We also agree with the *McGarry* court that a holding to the contrary "would place an incommensurate burden on the government, unnecessary for the protection of commercial privacy" and "could lead taxpayers to play a game, inviting seizure on the chance that it could arguably be converted into an effective vaccination against any future use of such routine records." *Id.*

The orders directing suppression of the Mundex letters are reversed.

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Decision of United States District Court
May 13, 1986

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-against-

JOHN PIMENTEL and DUROYD MANUFACTURING CO., INC.,

Defendants.

S 85 Cr. 1051-CLB

MEMORANDUM & ORDER

A grand jury has returned a superseding indictment charging defendants John Pimentel and Duroyd Manufacturing Co., Inc. ("Duroyd") with defrauding the United States Department of Defense ("DoD") and submitting false price and cost information to the DoD as part of the alleged fraud.

On December 18, 1985 this Court found that a Government auditor had illegally searched Duroyd's files and illegally seized two original letters from them (the "Mundex letters"). Accordingly, these letters were, on defendant's motion, ordered suppressed. On February 6, 1986 this Court declined to modify its order and concluded that although the original letters must be suppressed, carbon copies of the letters, obtained from Mundex could be introduced at trial because inevitably the Government auditor would have discovered them. *United States v. Pimentel*, 626 F.Supp. 1372 (S.D.N.Y. 1986). Familiarity on the part of the reader with those proceedings and decisions must be assumed.

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Defendants have asked that this Court reconsider its factual finding that inevitably the Government would have discovered the letters. They have submitted for the Court's review excerpts from the Defense Contract Auditor Agency Manual (the "D.C.A.M."), which they claim indicates that the Government would not have discovered the letters but for the illegal search. This Court granted Defendants' motion for reconsideration and directed the parties to submit additional memoranda and exhibits concerning the inevitability of the discovery of the letters.

Defendants have also moved to dismiss Counts 2 and 3 of the indictment on the grounds that they fail to state with adequate specificity the nature of the offenses with which they are charged. Defendants also contend that Count 3 is duplicitous.

Duroyd entered into a firm fixed price negotiated subcontract in September, 1982 with the Small Business Administration to supply certain materials on a prime contract with the DoD. Duroyd agreed to provide a number of components for a projectile according to various specifications, including one part that had to be manufactured to a hardness level of "Rockwell C 22." When Duroyd submitted its original certificate of cost and pricing data it indicated that it was relying on an estimate from a sub-contractor that included the cost of heat-treating the metal to achieve the specified hardness.

In November, 1983 the Defense Contract Audit Agency elected to audit Duroyd and assigned Mr. Neil Hanrahan to perform the audit. In a letter to Mr. Pimentel informing him of the agency's decision to conduct the audit, Mr. Vito Soranno, the Manager of the Northern New Jersey Branch office asked him to "provide this office with the following data by 15 December 1983: 1. Certificate of current cost or pricing data. 2. Latest D.D. Form 633. 3. Incurred Costs by Element." Mr. Hanrahan

arrived at Duroyd's offices in Yonkers, New York in February 1984 and began the audit. By examining the costs incurred by Duroyd Mr. Hanrahan learned that Duroyd had purchased metal with the proper specifications, and that heat treatment had not been necessary to achieve the required hardness. Duroyd had consequently obtained the metal at substantially less than the amount it had stated in its submitted certificate of current cost and pricing data.

Mr. Hanrahan subsequently obtained two letters sent to Duroyd by Mundex Metals, the metal vendor, in 1982. These letters indicated that Mundex was then prepared to sell metal with the required hardness to Duroyd without any charge for heat treating it. After a hearing, this Court concluded that the auditor had illegally obtained these letters in violation of defendants' Fourth Amendment right to be free from unreasonable warrantless searches and seizures. Based on its understanding of the audit process at that time, however, this Court found that the Government would have inevitably discovered the letters. Based on that finding and the Supreme Court's enunciation of the "inevitable discovery" exception to the exclusionary rule as explained in *Nix v. Williams*, 467 U.S. 431 (1984), the original letters were suppressed, but the "fruits" of their discovery were ruled admissible at trial. 626 F.Supp. at 1374. Under the inevitable discovery exception, evidence obtained as a result of illegal government conduct will not be suppressed if the Government can prove by a preponderance of the credible evidence that the incriminating evidence would have been discovered through legitimate means in the absence of the official misconduct.

It now appears, upon a careful review of the D.C.A.M. that the auditor, had he followed the procedures and guidelines for postaward audits as set forth in the

D.C.A.M., would probably *not* have unearthed the Mundex letters. Accordingly, there is no inevitable discovery.

The auditors assigned to conduct such audits are directed to follow an "audit program." D.C.A.M. Para. 3-103, Exhibit 2 to Defendants' Brief. This program indicates the steps to be performed and how much time the auditor should spend completing each task. The Manual explains that,

> "[a]lthough the information needed to prepare a satisfactory audit program will vary with each assignment, it should ordinarily include the following:
>
> (1) The purpose of the audit and its scope.
>
> (2) Information concerning the contractor's operations, its sources of revenue, principal locations, and similar items needed to understand the objectives and operational characteristics of its work.
>
> (3) A carefully drawn statement of what the auditor is expected to produce as a result of the audit. This statement should tell the auditor the issues in which he or she is expected to reach conclusions. In financial and compliance audits, the financial reports to be examined should be specified as well as principal laws and regulations to which compliance is to be determined. In audits of economy and efficiency, the criteria prescribed for evaluating the economy and efficiency of the audit area should be clearly set out." D.C.A.M. Para. 2-303.c; Exhibit 2 to Defendants' Brief.

The relevant audit program for Duroyd is reproduced as Exhibit 5 to Defendants' Brief. Among the "Initial Audit Steps" for this audit program, is the following:

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> "If the contract is complete and/or sufficient performance data are available, compare incurred cost with proposed costs by element to ascertain variances. These variances could be an indication that changes were made in the performance that were known at the time of negotiation but not disclosed to the Government. Audit steps should be performed to determine what conditions changed and if these changes should have been disclosed at the time of negotiation. Significant overruns should be investigated to ascertain if the scope of audit could be curtailed." Postaward Audit Program, Para. 5.a; Exhibit 5 to Defendants' Brief.

In the course of performing this step of the audit Mr. Hanrahan learned that Duroyd had not paid for heat treatment of the purchased metal. According to the manual and the law, however, Mr. Hanrahan had only limited means available to discover whether or not Duroyd or Mr. Pimentel *knew* that at the time of negotiations extra payment for heat treatment would not be necessary. The Manual states that

> "When the auditor uncovers or is alerted to any circumstances indicating fraud or other unlawful activities, he or she has a duty to pursue an examination to determine whether or not the errors are more pervasive than mere isolated cases until his or her suspicions are resolved. Factual information shall be developed using all generally accepted audit procedures necessary in the circumstances. *The use of any means other than audit procedures may be investigative responsibility and will not be assumed by the auditor unless specifically directed* by Headquarters Counsel." D.C.A.M. Para. 4-702.3.a.; Exhibit 2 to Defendants' Brief. (Emphasis added)

In other words, the auditor is not to go beyond the audit procedures without specific direction to do so.

The manual explains that P.L. 90-512 gives the Agency the right for three years after final payment to examine "all books, records, documents and other data of the contractor or subcontractor related to the negotiation, pricing and performance of the contract or subcontract . . . but only for the purpose of evaluating the accuracy, completeness and currency of cost or pricing required to be submitted." Under the law, Duroyd was required to submit to the DoD or to keep in its files any information relating to subcontract purchases that totalled $500,000 or more. Duroyd purchased the metal from Mundex Metals for less than that amount. Thus, the auditor did not have the right to demand copies of these vendor quotes, and Duroyd did not have the obligation under the contract to provide them to him.

The Government, in its papers, has not suggested to the Court a contrary understanding of the D.C.A.M. or the proper scope of the audit. Rather, it has argued that three factors, either singly or in combination, wholly apart from the audit would have led to a *criminal* investigation of the contract, and discovery of the Mundex letters. First, it contends that the D.C.A.A. already suspected Duroyd of defective pricing because the contract had scored seven on a ten point scale, where ten indicates the highest probability of defective pricing. Second, the Government contends that the auditor had an absolute right to request and to review all correspondence from vendors with whom Duroyd had negotiated. Finally, the Government asserts that Mr. Pimentel voluntarily provided the Mundex letters when Mr. Hanrahan requested vendor information.

The fact that the D.C.A.A. decided to audit Duroyd only after it scored relatively high on the defective

pricing predictor scale is irrelevant. The high score only suggested Duroyd as a civil audit target; it did not create a suspicion of criminal activity. Whether the Mundex letters would have been discovered inevitably arises as an issue only once the audit has begun. That is, the scope of the audit itself is the issue, not whether the audit would have occurred. Our consideration of the D.C.A.M. makes clear that the typical audit pursuant thereto does not include, and probably would not lead to, the examination of documents that the contractor is not required to maintain. Finally, this Court has already found that Mr. Pimentel did not give the letters to Mr. Hanrahan and that he obtained them illegally. *See* Tr. (Dec. 18, 1986) at 89-90.

The Government ultimately obtained copies of the incriminating Mundex letters from Mundex itself, because on the basis of Mr. Hanrahan's final audit report, the matter was referred to the Department of Defense Criminal Investigative Service in September 1984. In December, 1984 Special Agent Mitchell Schlitt interviewed Mr. Manfred Franitza of Mundex who provided him with carbon copies of the letters. These copies of the letters, as already discussed by this Court in its earlier decisions, are the among the fruits of the illegal search of Duroyd's files. *See* 626 F.Supp. at 1371. The Government has failed to prove by a preponderance of the credible evidence that without the illegal seizure it would have undertaken a criminal investigation of this contract and sought or found the Mundex letters by grand jury subpoena from Duroyd or from another source such as Mundex itself.

As already explained above, Mr. Pimentel and the others at Duroyd had no obligation to maintain or turn over these documents and, obviously, it was against their penal interest to do so. It is not necessary to infer that defendants could only have prevented the discovery

of the letters by some "obstruction of justice." *Cf. Segura v. United States*, 104 S.Ct. 3380, 3392 (1984). Indeed, defendants have contended throughout that they did not rely on those letters because they believed at that time that heat treatment would be necessary. The Government would have had no suspicion of Duroyd's criminal intent without first illegally seizing the Mundex letters. Thus, the entire criminal investigation and prosecution are among the fruits of the illegal search.

Defendants' other motions to dismiss Counts 2 and 3 for lack of specificity and duplicitousness are without merit. These Counts adequately state the elements for a false statement under 18 U.S.C. § 1001. Both Counts list the dates of the statements, what statements were false, the agency to which the statement was submitted and that defendants knew that these statements were false. An indictment is sufficient if it contains the essential elements of the offense so that it fairly informs the defendants of the charge against him and if it adequately enables the defendants to be protected against further prosecution for the same offense. *See United States v. Mouton*, 657 F.2d 736 (5th Cir. 1981); *see also United States v. Trotta*, 525 F.2d 1596 (2d Cir. 1975). The Government is not required to plead in the indictment what it believes was the truth. *Cf. United States v. Debrow*, 346 U.S. 374 (1953).

The doctrine of duplicity prohibits the charging of multiple offenses in a single count in violation of Rule 8(a), Fed. R. Crim. P. Count 3 charges defendants with submitting a single letter and exhibits to the Defense Contract Audit Agency - Philadelphia Region which contained several false statements. Although each false statement could be charged as a single offense it does not follow that their inclusion in a single count is necessarily duplicitous. It has become well established that an

indictment may charge multiple means which constitute a single offense, "even if the components of that single offense may otherwise be treated as separate offenses." *United States v. Kearney*, 444 F.Supp. 1290, 1293 (S.D.N.Y. 1978) *citing United States v. Zeidman*, 540 F.2d 314, 316-317 (7th Cir. 1976). Here, the several false statements within a single submission to a Government agency may be charged as a single count.

For the foregoing reasons the renewed motion to suppress the letters and the fruits thereof is granted. All further proceedings are stayed pending appellate finality.

So Ordered.

Dated: White Plains, New York
May 13, 1986

s

Charles L. Brieant
U.S.D.J.

Appendix D
Decision of United States District Court
February 6, 1986

UNITED STATES OF AMERICA

v.

JOHN PIMENTEL and DUROYD MANUFACTURING CO., INC.,

Defendants.

No. S 85 Cr. 1051-CLB.

United States District Court,
S.D. New York.

Feb. 6, 1986.

On reconsideration, on government's behalf, of its decision to suppress letters under inevitable discovery exception, the District Court, Brieant, J., held that government could not introduce at trial under inevitable-discovery exception to "fruit of the poisonous tree" doctrine, letters which had been illegally removed from the corporate defendant's files; government could introduce other evidence that would elicit same information contained in illegally seized letters, and thus could not claim that it was in worse position than if search had not occurred.

Order accordingly.

Henry Pittman, Asst. U.S. Atty., Rudolph Giuliani, U.S. Atty., New York City, for plaintiff.

Richard Sauber, Stephen Mansfield, Fried Frank, Harris & Shriver, Washington, D.C., for defendants.

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MEMORANDUM AND ORDER

BRIEANT, District Judge.

After a hearing on December 18, 1985, this Court found that the Government had illegally obtained two letters from Defendant Duroyd Corporation's files. Accordingly, this Court ruled that the Government could not introduce these letters as evidence at trial. The Government has asked this Court to reconsider its decision to suppress the letters under the inevitable discovery exception established in *Nix v. Williams*, 467 U.S. 431, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984). The reader's familiarity with the December 18, 1985 proceedings must be assumed.

The Government alleges that defendants conspired to defraud the United States by making false statements and submitting false claims in the course of bidding for fixed price contracts. These contracts were negotiated on a cost-plus basis. As the most recent superseding indictment spells out, Duroyd allegedly overstated the purchase price for parts used in assembling the contract items, in order to increase its profits on that contract. The two letters illegally removed from Duroyd's files imply that Mr. Pimentel wrote to one supplier asking him to overstate the price of a component part in a letter that Mr. Pimentel included in his cost calculations for that contract.

Although this Court found that the Government had obtained the letters in violation of Duroyd's Fourth Amendment rights, the Court decided not to suppress the "fruits" of this illegal search, because their discovery was inevitable. In stating its decision the Court may have implied that the letters themselves were the "fruit" of the search. Rather, in the parlance of Fourth Amendment jurisprudes, they are the "poisonous tree," not its "fruit." An examination of the facts in *Nix* itself makes this clear.

Appendix D
Decision of United States District Court
February 6, 1986

Following the disappearance in Des Moines, Iowa in December, 1968 of a ten year old girl, the police arrested and arraigned Williams in Davenport, Iowa, in connection with her disappearance. Although the police had told Williams' attorney that they would not question Williams while they transported him to Des Moines, one of the officers accompanying began a conversation with him. During the course of this "interrogation" Williams made several incriminating statements and also revealed the location of the girl's body. After his first trial, the Supreme Court ruled that introduction of his statements into evidence violated his Sixth Amendment right to counsel and reversed his conviction. *Brewer v. Williams*, 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977).

At his second trial the state did not introduce his statements into evidence, but did introduce evidence of the location of the body. Williams was again convicted. This time the Supreme Court affirmed the conviction, holding that introduction of the body's location did not violate Williams' Sixth Amendment rights, even though it was the "fruit" of unlawful government conduct. The Court held that it was not necessary to suppress the evidence because the State had proved by a preponderance of the evidence that ultimately it would have discovered the body without Williams' statements. *Nix v. Williams, supra*, 104 S.Ct. at 2512.

[1] The letters here are analogous to the statements found inadmissible in *Brewer*. That is, they are the "poisonous tree," and properly excluded from evidence. The Government argues in its reply brief that *Nix* applies to the poisonous tree as well as its fruit because, "[t]he Court nowhere mentioned the inevitable discovery exception to the 'fruit of the poisonous tree' doctrine." Reply Memo. at 2. In fact, the Court in *Nix* introduced its new exception to the Exclusionary Rule only in terms of

"fruit," or indirect product cases. *See Nix* at 2508, *citing Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 40 S.Ct. 182, 64 L.Ed.2d 319 (1920) and *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963); *see also Nix* at 2509, *citing United States v. Crews*, 445 U.S. 463, 100 S.Ct. 1244, 63 L.Ed.2d 537 (1980). In each of these cases, as in *Nix* itself, the illegally seized evidence itself was excluded from evidence. Only the indirect products of the illegally seized evidence were properly admitted into evidence.

Our Court of Appeals decision in *United States v. Alvarez-Porras*, 643 F.2d 54 (2d Cir.) *cert. denied*, 454 U.S. 839, 102 S.Ct. 146, 70 L.Ed.2d 121 (1981), decided before *Nix* is not to the contrary. In *Alvarez-Porras* the court did not embrace unconditionally the inevitable discovery exception. Rather, it found only that "on the unusual facts in this case, suppressing the evidence seized would not serve the deterrent purposes of the exclusionary rule." *Id.* at 66.

[2] The Government may introduce at trial other evidence that will elicit the same information contained in the illegally seized letters. Specifically, vendors who provided quotes to Duroyd can be subpoenaed to testify as to these communications. Thus, it can not claim that it is in a worse position than if the search had not occurred. *Cf. Nix* at 2511.

For the foregoing reasons this Court adheres to its decision to suppress the letters themselves as evidence at trial.

So Ordered.

SUPREME COURT, U.S.
FILED
MAY 20 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1569

In the Supreme Court of the United States

OCTOBER TERM, 1987

JOHN PIMENTEL, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

CHARLES FRIED
Solicitor General
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QUESTION PRESENTED

Whether evidence was properly admitted under the inevitable discovery doctrine.

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1569

JOHN PIMENTEL, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals affirming the judgment of conviction (Pet. App. 1a-3a) is reported at 841 F.2d 1117 (Table). The opinion of the court of appeals reversing an order suppressing evidence (Pet. App. 4a-11a) is reported at 810 F.2d 366. The opinion of the district court suppressing evidence (Pet. App. 12a-20a) is unreported. The prior opinion of the district court (Pet. App. 21a-24a) is reported at 626 F. Supp. 1372.

JURISDICTION

The judgment of the court of appeals was entered on January 22, 1988. The petition for a writ of certiorari was filed on March 22, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioners were

convicted of conspiracy to defraud the Department of Defense (Count 1), in violation of 18 U.S.C. 371; submitting false statements to the United States (Counts 2 and 3), in violation of 18 U.S.C. 1001; and submitting false claims against the United States (Counts 4-7), in violation of 18 U.S.C. 287. Petitioner Pimentel was sentenced to concurrent terms of three years' imprisonment on Counts 2 through 7, he was fined $5000 on Count 1, and he was ordered to make restitution. Petitioner Duroyd Manufacturing Company (Duroyd) was fined $70,000 and was also ordered to make restitution. The court of appeals affirmed.

1. Briefly summarized, the evidence at trial, which is not in dispute, showed that Pimentel was the sole owner of Duroyd.[1] In early 1982, Duroyd bid on a Department of Defense contract to manufacture certain metallic and nonmetallic parts used in an artillery shell. One such part was a column segment, which, according to the contract, had to be manufactured to a specified level of hardness. The contract price was supposed to equal Duroyd's projected costs plus a percentage for overhead and profit. The contract required that Duroyd certify that the cost and pricing data submitted with the bid were "accura[te], complete[], and curren[t]."

Duroyd submitted a bid that included the cost of a heat-treating process supposedly needed to bring the steel to the required hardness level. Duroyd certified that the cost estimate contained in the bid was "accura[te], complete[], and curren[t]." In fact, however, Mundex Metals Corporation had already informed Duroyd that it could deliver steel to Duroyd at the specified hardness level without any additional cost for heat treating. In a letter of

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[1] The statement of facts is taken from the briefs filed by the government in the court below (Nos. 86-1271 and 87-1354).

March 2, 1982, Mundex informed Duroyd that "[w]e have discussed in detail with our mill your requirements, particularly with regard to hardness, and are pleased to inform you that the mill is now in a position to guarantee a hardness of min. Rockwell C-22." GX 12; C.A. App. A135.[2] After receiving that letter, Pimentel requested that Mundex submit a new letter omitting all reference to the specified hardness level. Mundex complied with that request. Under a cover letter of March 19, 1982, Mundex supplied a revised, backdated version of the March 2 letter that did not refer to the hardness of the steel. GX 6; C.A. App. A134, A136. Duroyd attached the backdated letter to its bid. In September 1982, Duroyd was awarded the Defense Department contract. Mundex supplied the steel to Duroyd at the specified hardness level, and Duroyd was not required to harden any of the steel.

In November 1983, the Defense Contract Audit Agency decided to conduct a post-award audit of Duroyd in connection with the contract and assigned Neil Hanrahan to conduct the audit. At a pre-audit conference, Hanrahan asked Duroyd to provide him with its files of vendor quotations, vendor invoices, purchase orders, and incurred costs. In reviewing the files, Hanrahan discovered that the files did not contain any invoices for heat treating the steel used in manufacturing the column segments, even though that cost item had been included in Duroyd's proposal package. When Hanrahan asked Pimentel when he had first learned that Mundex could supply prehardened

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[2] "C.A. App." refers to the appendix filed in the court of appeals on the government's interlocutory appeal from the order of the district court suppressing the evidence (No. 86-1271). That appendix contains the district court's initial bench ruling on the suppression motion (C.A. App. A119-A129), which is not included in petitioners' appendix. A copy of this ruling is attached.

steel, Pimentel falsely replied that he first learned that Mundex could do so in October or November of 1982. Thereafter, pursuant to Pimentel's instructions, an employee of Duroyd asked Mundex to write two letters to Duroyd backdated to April 5, 1982, and December 2, 1982. The first letter stated that Mundex could not provide steel at the necessary hardness level. GX 16. The second letter stated that Mundex had improved its manufacturing process and could now manufacture steel at the required level of hardness. GX 17. Those two letters were turned over to the Department of Defense in an attempt to rebut the conclusion reached by Hanrahan that Duroyd had failed in 1982 to make full disclosure of its cost and pricing data regarding the heat treatment.

In the course of his audit, Hanrahan discovered the earlier, March 1982 letters from Mundex to Duroyd. Hanrahan testified that those letters were given to him by a Duroyd employee at his request (C.A. App. A83-A95), but petitioners contended that Hanrahan had taken them from Duroyd's files without permission (*id.* at A50-A56, A63-A65, A69-A70).

2. Before trial, petitioners sought to suppress the March 1982 letters from Mundex to Duroyd showing Pimentel's knowledge that Mundex could supply steel for the column segment without any need or charge for heat treating. The district court found that the government had not proved by a preponderance of the evidence that Hanrahan obtained those items with Duroyd's consent (C.A. App. A121; App., *infra*, 2a). It therefore held that Hanrahan had conducted an illegal warrantless search in violation of the Fourth Amendment.

The court observed, however, that the letters would inevitably have been discovered during the course of the audit. C.A. App. A121-A122; App., *infra*, 3a. The court explained that a government regulation required Duroyd

to turn over the letters to the auditor on request, and therefore Duroyd did not have a reasonable expectation of privacy in the letters. Moreover, when the audit failed to turn up a bill for heat treatment, the court found that Hanrahan would have interviewed Mundex, the steel vendor, as well as the company that was supposed to supply the heat treatment, according to Duroyd's bid proposal, to find out why there had been no heat treatment. C.A. App. A129; App., *infra,* 2a-8a. Mundex, in turn, would have disclosed to Hanrahan that the steel was already heat treated. For that reason the court concluded that "these documents would have been found in any event as a result of the audit, that the audit was started, of course, before these documents were found or known to the government, and therefore the prosecution here is not the fruit of the poison[ous] tree." C.A. App. A122; App., *infra,* 3a. The court suppressed the letters, but permitted the government to prove "by independent evidence" that false claims were submitted and that no money was paid for heat treatment. C.A. App. A122-A123; App., *infra,* 3a-4a.

On reconsideration, the district court suppressed the letters on the ground that the inevitable discovery doctrine does not apply to "the poisonous tree," but only to the "fruit of the poisonous tree." In the court's view, the letters were the "poisonous tree." Pet. App. 22a-24a. On further reconsideration, the district court reversed its earlier finding that the letters would have been inevitably discovered. It now concluded that "the auditor did not have the right to demand copies of these vendor quotes, and Duroyd did not have the obligation under the contract to provide them to him" (*id.* at 17a).

3. The court of appeals reversed. Pet. App. 4a-11a. At the outset, the court held that there "can be no question concerning the Defense Department auditor's right to examine these letters in the course of his audit" (*id.* at 6a).

Both the statutes and the contract so provide (*ibid.*). The court of appeals thus concluded that the district court's original finding that the letters would inevitably have been discovered during the course of the audit was correct (*id.* at 8a). The court further held that the inevitable discovery doctrine, which was first adopted by this Court in *Nix* v. *Williams*, 467 U.S. 431 (1984), "applies to the direct as well as the indirect products" of an unlawful search (Pet. App. 8a). To reach that conclusion, the court observed that several court of appeals decisions cited with approval in *Nix* applied the doctrine to the direct products of a constitutional violation. See *United States* v. *Romero*, 692 F.2d 699 (10th Cir. 1982); *United States* v. *Apker*, 705 F.2d 293 (8th Cir. 1983), cert. denied, 465 U.S. 1005 (1984); *United States* v. *Roper*, 681 F.2d 1354 (11th Cir. 1982), cert. denied, 459 U.S. 1207 (1983). The court of appeals noted that the district court had mischaracterized the letters as "the poisonous tree." Rather, the illegal search was the "the poisonous tree"; the letters were the "fruit" or product of that illegality. Pet. App. 7a n.1. Finally, the court held that no deterrent purpose would be served by suppression, because the ongoing audit "would have uncovered the letters at issue[;] [a]dmitting them in evidence would not encourage Fourth Amendment abuse" (*id.* at 10a).

4. Following reversal of the suppression orders, petitioners were tried by a jury, convicted on all counts, and sentenced. The court of appeals affirmed their convictions without revisiting the exclusionary rule issue. Pet. App. 1a-3a.

ARGUMENT

Petitioners contend that the March 1982 letters from Mundex to Duroyd should have been suppressed. They do not dispute the finding of the district court in its oral opinion, which was upheld by the court of appeals, that the government carried its burden of proving by a pre-

ponderance of the evidence (see *Nix* v. *Williams*, 467 U.S. at 444 & n.5) that the government would inevitably have discovered the letters during the course of the audit. In particular, petitioners do not dispute that, pursuant to the terms of Duroyd's contract and the pertinent statute and regulation,[3] the Defense Department auditor had an absolute right to examine all vendor quotations, vendor invoices, and purchase orders, including the file containing the original and the replacement March 2 letters from Mundex. They do not dispute that auditor Hanrahan had requested to see all such documents before the audit began and that Duroyd was required to turn the letters over to Hanrahan pursuant to that request. Nor do they dispute that Hanrahan would have interviewed representatives of Mundex to determine why the file did not contain any invoices for heat treatment, and that those interviews would have led to the discovery of the same information.

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[3] 10 U.S.C. 2306(f)(3) provides:

> For the purpose of evaluating the accuracy, completeness, and currency of cost or pricing data required to be submitted by this subsection, any authorized representative of the head of the agency who is an employee of the United States Government shall have the right, until the expiration of three years after final payment under the contract or subcontract, to examine all books, records, documents, and other data of the contractor or subcontractor related to the negotiation, pricing, or performance of the contract or subcontract.

Similarly, Defense Acquisition Reg. § 7-104.41(c) provides:

> *Cost or Pricing Data.* If the contractor submitted cost or pricing data in connection with the pricing of this contract * * * the Contracting Officer or his representatives who are employees of the United States Government shall have the right to examine all books, records, documents and other data of the Contractor related to the negotiation, pricing or performance of such contract, change or modification, for the purpose of evaluating the accuracy, completeness and currency of the cost or pricing data submitted.

We submit that the decision of the court of appeals is correct. All of the prerequisites to the application of the inevitable discovery rule heretofore recognized by this Court and the federal courts of appeals have been met, including the requirement imposed by some courts that there be an ongoing investigation at the time of the illegality.[4] The government therefore should not be placed in a *worse* position by suppression of the letters than it would have occupied if no misconduct had occurred (*Nix* v. *Williams*, 467 U.S. at 443, 445, 447). There is no basis in the rationale of *Nix* for the rule, which petitioners urge, that the government should be deprived of evidence that it inevitably would have obtained just because that evidence can be labeled the "direct" rather than the "indirect" product of a search that has been held unlawful.

Nevertheless, petitioners' proposed rule resembles the argument advanced by the petitioners in *Murray* v. *United States*, No. 86-995, and *Carter* v. *United States*, No. 86-1016 (consolidated; argued Dec. 8, 1987), that all "primary" as opposed to "derivative" evidence must be suppressed without regard to the inevitable discovery and independent source doctrines. See also *People* v. *Stith*, 69 N.Y.2d 313, 506 N.E.2d 911, 514 N.Y.S.2d 201 (1987). We therefore agree with petitioners that this case should be held pending the Court's decision in *Murray*. If the

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[4] See *United States* v. *Namer*, 835 F.2d 1084, 1088 (5th Cir. 1988) (citing *United States* v. *Cherry*, 759 F.2d 1196 (5th Cir. 1985)), cert. denied, No. 87-1404 (May 16, 1988); *United States* v. *Satterfield*, 743 F.2d 827 (11th Cir. 1984), cert. denied, 471 U.S. 1117 (1985). In a single cryptic sentence, petitioners state that "[t]he court of appeals did not make a specific finding that the audit would have been pursued even had the letters not been unlawfully observed and taken" (Pet. 5). To the contrary, the court of appeals observed that "there was an ongoing audit which surely would have uncovered the letters at issue" (Pet. App. 10a).

Court adopts the distinction between "primary" and "derivative" evidence that is being urged in *Murray*, this case should be remanded to the court of appeals for further consideration. Otherwise, there is no need for this Court to review the straightforward application of the inevitable discovery rule by the court below, and the petition should be denied.[5]

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[5] In *Murray*, the event that inevitably would have led (and in fact did lead) to the discovery and seizure of the evidence in question was the acquisition of a valid search warrant. The bales of marijuana at issue in that case had earlier been seen during a warrantless search of the premises, which the court of appeals assumed to be illegal. Petitioners in *Murray* have made various arguments based on the Warrant Clause of the Fourth Amendment; they describe their case (and a larger class of cases including *Segura* v. *United States*, 468 U.S. 796 (1984), and *United States* v. *Griffin*, 502 F.2d 959 (6th Cir.), cert. denied, 419 U.S. 1050 (1974)) as "search-unlawfully-first-get-the-warrant-later" cases. The *Murray* petitioners' arguments in this regard, even if accepted by this Court, would be of no help to petitioners in this case. The government's (now undisputed) factual contention is not that it would have discovered the March 1982 letters pursuant to a warrant, but that the ongoing audit would have led inevitably to the discovery of those letters. Thus, even if petitioners prevail in *Murray*, it may not be necessary or appropriate for the court of appeals to consider further its decision in this case.

CONCLUSION

The petition for a writ of certiorari should be held pending resolution of *Murray* v. *United States*, No. 86-995, and *Carter* v. *United States*, No. 86-1016, and then disposed of in light of that resolution.

Respectfully submitted.

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MAY 1988

APPENDIX

Court's Decision

* * * * *

THE COURT: Well, you people have come up with a rather difficult motion and the court has been giving it consideration.

The court makes the following findings of fact and conclusions of law.

The court takes the position that the burden of proof is upon the government in a situation involving a consent search, which is really what this is, to prove by a preponderance of the credible evidence that the documents obtained were obtained as a result of a consent on the part of the person having standing to assert a Fourth Amendment right with respect to the paper or document.

In this case the court finds that the documents are the property of Duroyd Manufacturing Company and that it has a Fourth Amendment right in the security of its own papers, including these highly incriminating letters, and the court finds itself confronted with a difficult question as to credibility, and the court observed all of the witnesses, and particularly observed the witness Petrone. The court accepts as truthful his statement as to the methods of keeping the files there, and also that he did not personally put the green file in the audit-room which had been given to Mr. Hanrahan to do his work. The court does not believe that Mr. Pimentel put it there.

I am not making a finding that Mr. Hanrahan is necessarily untruthful, but it's a question of the weight of the testimony. I don't think anybody is deliberately lying in this context. I think everyone has some degree of interest in the matter.

There is circumstantial evidence which supports the truth of the defendant's version here, that being that once these letters were discovered they suddenly changed the methods of dealing with the auditor.

The court notes that Manfred Goldstein was not produced as a witness. His testimony would have been admissible under rule 801(d)(1)(A)(1), and since he is not an attorney, the court understands, he won't be privileged, so if anyone has told a tall story in this hearing they are likely to have a problem. But the court to the best of its ability has weighed the evidence here.

The court finds and concludes that the letters were not obtained by the government as a result of a consent or a voluntary production of them or even a negligent production of them, and while the complaints against Mr. Hanrahan's actions may be somewhat overblown, the court does accept at least that much of the testimony that the green file was found in that office, made available to Hanrahan, and that this was disturbing to the defendants, probably because they had a guilty conscience on this point, a consciousness of guilt. It made them outraged to find that this file was there, and I at least believe for purposes of this hearing, they did in fact consult Mr. Manfred Goldstein, and Mr. Goldstein told them to demand that in the future all papers be requested in writing and to make Mr. Pimentel the sole person dealing with the auditor.

So the court believes that the documents were not obtained, Exhibits 2 and 3, as a result of a consent search or a voluntary production or even a negligent production, which would be equivalent to voluntary, and that the government has not proved that in the case by a preponderance of the credible evidence as it is required to do having the burden on this type of a hearing.

The court finds no further than that. Specifically I decline to accept any theory that this investigation is a

fruit of the poison tree. The court regards the documents, since they belong to the corporation, as being governed by Regulation 7-104.41, and the court believes that that regulation was sufficient notice to the corporation that any document which met the definition there was something which the government had the right to inspect at all times or reasonable times while in the possession of the contractor, in this case the corporate defendant, Duroyd Manufacturing Company, and I regard as irrelevant any notion that the Department in the auditing of its contracts has treated this clause as more restrictive than its precise words imply.

The test here for Fourth and Fifth Amendment purposes is one of the reasonable expectation of privacy and confidentiality. Nobody could read that regulation and believe that this kind of a paper in the corporation's posssession and belonging to the corporation could not be examined or required to be produced by the Department of Defense auditors.

So, I therefore conclude that these documents would have been found in any event as a result of the audit, that the audit was started, of course, before these documents were found or known to the government, and therefore the prosecution here is not the fruit of the poison tree. However, I think it is proper to uphold the Fourth Amendment jurisprudence which has been inflicted on us by the Supreme Court and with which I do not agree, but it is my duty to follow the case law to the best of my understanding and belief, and I do.

Accordingly, the court adjudges that these particular two letters, Exhibits 2 and 3, are suppressed, but that that is an adequate remedy and that the prosecution is not the fruit of the poison tree and the government may go to trial

on such counts of the superseding indictment to be filed here which do not found themselves specifically on those papers.

In other words, the government can prove by independent evidence, if it has such a trial, the fact that false claims or false statements were submitted to the government other than these two documents, and can prove independently that no money was paid for heat treatment, if that's what the gravamen of the charges are.

The court has assumed and I think all counsel have assumed in this hearing that a superseding indictment will be substantially the same as the existing indictment except more specific, and the court has assumed, although nobody has said so, that the document or false writing used in Count Three or relied upon in Count Three, that letter is not the letter which is Exhibit 2, but if I am incorrect on that, then Count Three would not be capable of being the subject of a trial since the letter itself is being suppressed.

Is there a different letter in Count Three?

MR. PITMAN: Yes, your Honor, there is.

THE COURT: That has to be made clear. The court at this time entertains requests to make any further or additional findings of fact or conclusions of law.

MR. PITMAN: May I be heard briefly, your Honor. In your Honor's findings of fact your Honor concluded that Exhibits 2 and 3 would have been found in any event, that they were subject to the regulation.

THE COURT: Well, certainly Exhibit 2 is. I am not so sure about Exhibit 3, becaue that may not literally—may I see that again, please. Exhibit 3—yes, I think because of the second paragraph that too would have been found.

MR. PITMAN: Your Honor, if I may, under the Supreme Court decision of Nix v. Williams, the government will submit that these two documents would never-

theless be admissible. Nix v. Williams holds even when there is an illegal search, if the objects found in that search would inevitably have been discovered in any event, the breach of the Fourth Amendment is immaterial and the results of the search are admissible.

Nix v. Williams, as your Honor may recall, was the case involving the defendant who was believed to have murdered a young girl. He was interrogated by the police without a lawyer regarding the location of the girl's body, the so-called Christian burial speech was given. And based upon the interrogation—

THE COURT: That's a confession case?

MR. PITMAN: It's a Fourth Amendment case, your Honor. And that case stands for the proposition that even when there is an illegal search, if the object would have inevitably discovered, it is nevertheless admissible.

THE COURT: Well, I always treated that case as being a confession case.

What do you say about that, Mr. Sauber?

MR. SAUBER: Your Honor.

THE COURT: If it is as simple as all that, there was no use in this motion.

MR. SAUBER: I am not familiar with Nix and I will read it. But I understood your ruling to be—

THE COURT: The public would have found the body in the Nix case? Somebody would have stumbled over it?

MR. PITMAN: There was an organized search party, a search being conducted of the interrogation.

THE COURT: That may be a little different. In the actual context of this case, I think the court should adhere to its decision.

All right, now, do you want to come over here and tell me what you want to do?

MR. SAUBER: Yes, your Honor.

MR. PITMAN: Your Honor may I be heard?

THE COURT: Do you want to be heard further on the record? All right.

MR. PITMAN: Your Honor, I have here a copy of the decision in Nix v. Williams, and the focus of the court in court's decision in Nix v. Williams was to insure that the exclusionary rule does not put the prosecution in any worse position than it would have been in had an illegal search not taken place.

THE COURT: You are not, I don't believe, because it is quite clear to me from my brief exposure to this case today that it will be very easy to determine that that heat treating company never heat treated anything. Isn't that true?

MR. PITMAN: That's correct.

THE COURT: And that would be regarded as a false statement, if somebody says they did heat treat and they paid them money and they didn't in fact heat treat.

MR. PITMAN: Your Honor, the gravamen of the offense here with respect to the heat treatment was that Duroyd knew prior to the bidding on this contract that heat treatment was not necessary, that Duroyd knew in 1982 before it submitted its bid proposal to the Department of Defense that Mundex could provide the metal at R C 22 without heat treatment. In order to cover up that fact it solicited the second letter, the March second letter, submitted that second March 2 letter to the government and told the government that heat treatment was necessary, and included cost for heat treatment as a component part of its bid proposal.

So the fact that there was no heat treatment here is not critical. The critical fact is that Duroyd knew in 1982 that heat treatment was not necessary, but nevertheless misrepresented to the government that heat treatment was in fact necessary. It had the written representation from its contractor that the metal could by supplied at the specified

hardness without heat treatment and the government submits that in light of the court's finding that these two letters would have been discovered in any event, exclusion of these letters does put the government in a worse position than it would have been in had there been no illegal search, that the whole purpose of the inevitable discovery doctrine as articulated in Nix v. Williams is to insure that the prosecution is not put in a better position because of the illegal search but also to insure that it is not put in a worse position because of the illegal search.

In effect where evidence would have inevitably been discovered—

THE COURT: My understanding is that as soon as the auditor found there was no heat treatment, the contracting officer would have recovered the money from Duroyd. That was my understanding of Mr. Hanrahan's testimony. He went in to see what was done in performance of the contract in a post audit investigation on his part and he would have inevitably found that this heat treatment was never done, that there was no bill for it, or that the vendor, I guess he told me there was no bill for it, and that Duroyd never obtained it and there would have been a recovery of that amount.

MR. PITMAN: Your Honor, as I understand Mr. Hanrahan's testimony, as I understand the facts in this case, the heat treatment would have only been recoverable had there been evidence that Duroyd knew prior to its bid that heat treatment was not necessary. I mentioned at the start of today's proceedings and maybe I didn't make myself clear that this contract was negotiated on a cost plus basis. It was a fixed price contract negotiated on a cost plus basis.

That is, the contract price was arrived at by taking the contractor's costs, adding a percentage for overhead and profit, and setting the contract price at that level. After the

contract was executed, any increase or decrease was borne by the contractor. He would get the benefit of any new events or would bear the burden of any events that were adverse to the contract price but up until the execution of the contract, the contractor was under an obligation to make full disclosure to the government and the gravamen of the offense here is that the contractor knew in 1982 that heat treatment was not necessary, nevertheless failed to disclose this fact to the government.

THE COURT: Would the post completion audit have showed that they did not in fact pay for heat treatment?

MR. PITMAN: Yes, it would, your Honor. I believe Mr. Hanrahan testified that he found no invoices for heat treatment.

THE COURT: That's what I thought he said and that would have inevitably led him to the heat treatment vendor and the steel vendor and he would have asked him how come there is no heat treatment, and he would have found that the goods were submitted as already treated.

MR. PITMAN: That's correct, your Honor.

THE COURT: So you are not in a worse position. You can prove it easily enough. You don't need the letters to prove it.

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